RECORD AND BRIEFS

No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* ENERGY AND WILDLIFE ACTION COALITION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Energy and Wildlife Action Coalition ("EWAC") respectfully submits this brief as amicus curiae in support of the petitioner Weyerhaeuser Company.[2] EWAC is an unincorporated association headquartered in Washington, D.C. comprised of electric utilities, electric transmission and distribution providers, renewable energy companies, and related trade associations. EWAC members operate throughout the United States.

EWAC's fundamental goal is to evaluate, develop, and promote reasonable environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

The Fifth Circuit's ruling will have a significant impact on EWAC members. EWAC's members develop, construct, maintain, own, and operate electric generation, transmission, and distribution facilities that are

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), written consent to the filing of this brief has been obtained from counsel for Petitioner and Respondents. Petitioner's consent is on file, as is consent of Respondent Markle Interests LLC, et al. Document confirming consent of Respondents U.S. Fish and Wildlife Service, et al. and Center for Biological Diversity, et al., have been submitted to the Clerk's office.

[2] EWAC also supports the arguments advanced by the companion petition filed by Markle Interests, LLC, and others, No. 17-74.

located or proposed to be built on private and public lands that are not habitable by threatened or endangered species ("listed species"), and yet these areas could be designated as critical habitat for such species under the criteria upheld by the divided panel of the Fifth Circuit.

Endangered Species Act ("ESA") consultation requirements may be triggered under ESA section 7(a)(2) if a proposed facility is located on or crosses federal lands or if it requires a federal permit or approval. *See* 16 U.S.C. § 1536(a)(2). Many EWAC members have existing facilities on federal lands and will continue to construct across federal lands to meet the electricity needs of their customers. Further, many EWAC members' facilities on public or private lands require federal approvals such as Clean Water Act ("CWA") section 404 permits and Federal Energy Regulatory Commission ("FERC") licenses and some receive federally backed financing. If critical habitat is present in any of these scenarios, ESA section 7(a)(2) triggers additional review. This additional review can result in significant increases in the time and cost for the affected project, which ultimately results in increased costs to electricity consumers. Other EWAC members obtain private financing to construct their facilities. The existence of critical habitat or the threat of a potential critical habitat designation within a facility's footprint also adversely impacts private financing, as lenders and investors react to the increased costs and risks posed by critical habitat.

SUMMARY OF ARGUMENT

The Fifth Circuit has blessed a standard for designating land as "critical habitat" that is currently uninhabitable by a listed species and has no prospect of ever becoming habitable by that species, thereby

imposing an unworkable and unreasonable regulatory burden on the development and continuing operation of electrical infrastructure throughout the country.

The Fifth Circuit wrongly deferred to the U.S. Fish and Wildlife Service's ("Service") designation of an area as "critical habitat" for the endangered dusky gopher frog (*Rana sevosa*) even though that area cannot sustain that species, now or in the foreseeable future, and has no connection to any area that is actually habitable by that species.

There are real consequences for the nation's electricity generation, transmission, and distribution infrastructure from designating areas that cannot be inhabited by a listed species as "critical habitat" and from extending the protections – and regulatory requirements – of the ESA to those areas. Through this *amicus* brief, EWAC offers the Court a window into how the Fifth Circuit's decision could disrupt the development and ongoing operation of its members' facilities.

EWAC also expands upon the Petition's discussion of some of the legal errors made by the Fifth Circuit majority in its opinion. The Fifth Circuit incorrectly limited its analysis to the ESA's definition of "critical habitat" and failed to consider how the term is used in the statute's operative provisions or in the additional criteria for critical habitat provided by the ESA provision that authorizes the designation of "critical habitat" by regulation.

The concept that "critical habitat" is, first and foremost, habitat for a listed species is embedded in the ESA. When the Service lists a species under the ESA the statute directs the Service, "to the maximum extent prudent and determinable," to designate by regulation

"*any habitat of such species* which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). The ESA also requires federal agencies to consult with the Service before undertaking or authorizing an action that is likely to destroy or adversely modify "habitat . . . which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2).

The Fifth Circuit's erroneous approach to interpreting the ESA resulted in it giving improper deference to a Service interpretation that conflicts with the plain language of the statute's operative provisions. It also brought the Fifth Circuit into conflict with prior decisions of the Ninth Circuit, which recognized that the criteria for designating unoccupied critical habitat are more stringent, not less stringent, than those applicable to occupied critical habitat. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010).

REASONS FOR GRANTING PETITION

I. Designating Areas That Are Not Habitable By A Listed Species As "Critical Habitat" Harms The Development And Operation Of Energy Infrastructure.

Constructing electricicity generation, transmission and distribution facilities requires thousands of acres of land and years of planning and development. Once this electrical infrastructure is constructed, ongoing operations include maintenance, emergency repairs, and improvements. The designation of critical habitat in areas uninhabitable by listed species could have severe economic consequences for EWAC members' existing and future energy infrastructure. Ultimately, this cost is borne by the consumers and taxpayers.

EWAC members can and often do design and plan facilities to avoid or minimize impacts to areas known to support listed species. For example, a transmission line or wind or solar energy facility may be sited, when feasible, to avoid wooded areas that are suitable for listed bat species or riparian habitat that supports listed salamanders. The Fifth Circuit's decision allows the Service to designate as critical habitat former woodlands that were logged long ago and converted to other uses on the premise that the land could one day revert back to forest and grow into suitable bat habitat. The Service also could designate as critical habitat land near streams that has been converted from native vegetation to agriculture but could, in theory, one day be restored to support listed salamanders. Electrical infrastructure that crosses these sites and that had been sited with the specific objective of avoiding sensitive habitat suddenly and unexpectedly overlaps critical habitat. In both cases and other similar ones that could arise, it would be impossible for EWAC members to factor such possibilities into their siting and routing decisions and extremely difficult to budget for these uncertainties.

The energy projects undertaken by EWAC's members take years to design and construct. Electricity generation locations and transmission routes are carefully investigated, weighing a host of factors that routinely include avoiding and minimizing impacts to sensitive habitats and other natural resources. Once decisions are made about routes and facility locations, it normally takes several years to acquire or access property, obtain permits, and construct the facilities. As development proceeds, it becomes increasingly expensive and challenging to change the design, reroute a segment, or relocate facilities.

But all of the care an entity takes to avoid sensitive habitats would be for naught if the Service can interject, at any point in the development timeline or the operating life of a project, a determination that lands that do not contain the physical or biological features necessary to sustain an ESA-listed species nevertheless are "unoccupied critical habitat" and subject to the full protections afforded by the ESA. A project developer or facility operator simply cannot anticipate or develop contingencies for this entirely unpredictable risk that land which is not habitat can be declared by the Service to be "critical habitat," with attendant regulatory consequences.

Oftentimes, even when private entities are constructing electrical infrastructure on private land, construction requires some level of federal permitting and may involve federal financial support. If a federal permit is required or federal funding is provided, the federal agency is obligated by ESA section 7(a)(2) to consider whether the activity it is authorizing will destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). One of the most common federal authorizations that EWAC members must secure is authorization under CWA section 404 for placing fill in waters of the United States. 33 U.S.C. § 1344. In many parts of the country, it is virtually impossible to site electrical infrastructure of any significant length and avoid impacting wetlands. Thus, many projects require section 404 permits for wetlands impacts at multiple sites along their routes. The U.S. Army Corps of Engineers' (the "Corps") issuance of a section 404 permit is subject to the ESA's consultation requirement, including consideration of potential impacts on critical habitat. *See* 16 U.S.C. § 1536(a)(2).

The Corps has adopted a streamlined Nationwide Permit ("NWP") program under CWA section 404 that is "designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). EWAC members regularly rely on the NWP program for expedited authorization to construct, operate, and maintain their facilities. For example, NWP 12 authorizes utility line work with limited impacts on wetlands and waterbodies:

> Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017).

For an activity to be authorized under the NWP, the activity must adhere to a set of general conditions. General Condition 18 requires that non-federal permittees (such as EWAC members) notify the Corps if any designated "critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat," and the activity cannot proceed until the Corps has completed its obligations under ESA section 7(a)(2). 33 C.F.R. § 330.4(f)(2). If critical habitat might be affected or is within the vicinity of its NWP activity, a project proponent is thrown into a delayed permitting pathway, requiring pre-construction notification and potential consultation between the Corps and the Service. *Id.* The Fifth Circuit's decision would create significant uncertainty in this process. If a designation occurred

during project development, despite a project proponent's best efforts to avoid sensitive habitats and thereby reduce potential wildlife impacts and permitting burden, it would impose these additional costs and delays even though the "critical habitat" is not only unoccupied, but uninhabitable by the species.

If the Service requires formal consultation, the Service's Biological Opinion likely will require the implementation of measures that add further costs and delays, defeating the NWP objective of regulating "with little, if any, delay or paperwork." 33 C.F.R. § 330.1(b). Perversely, the fact that the land currently is uninhabitable is likely to result in even greater costs for the proponent, particularly if the Service seeks to condition what should otherwise be a simple permit on some effort to convert the land to a condition that is useable by the species. This outcome is unreasonable, will increase costs and cause delay, and could prevent projects from being built or existing infrastructure from receiving necessary improvements, disrupting access to reliable and affordable electric power, all while providing little or no benefit for listed species.

The time, complexity, and cost of federal permitting increase where critical habitat is present. For example, one EWAC member was required to obtain a CWA permit for construction activities, which in turn triggered ESA consultation as the project occurred within areas designated as Canada lynx critical habitat. The Service could not definitively identify any effect the project would have on the critical habitat, and yet the company was required to conduct pre-construction, construction, and post-construction monitoring of lynx in the area. Not only did the existence of critical habitat add significant length to the permitting process, but the potential effects to the critical habitat

also triggered additional costs even where the Service could not definitively identify effects to the species.

This scenario would be even more complicated if the "critical habitat" in question were uninhabitable by the listed species. If the potential effect of a project on useable Canada lynx habitat is unclear, it would be that much more difficult to respond to Service concerns about potential effects to habitat that is not habitable.

EWAC members have thousands of miles of existing electric transmission and distribution facilities that occur on federal lands, and they will continue to develop and improve these facilities in the future in order to ensure delivery of safe and reliable electric power to America. The siting and construction of new infrastructure, as well as the operation and maintenance of existing infrastructure, on federal lands are subject to rights-of-way ("ROW") obtained from the relevant federal agencies (Bureau of Land Management, U.S. Forest Service, etc.). Grants of ROW accesses are discretionary federal actions, and therefore trigger the action agency's obligation to consult with the Service under the ESA. 16 U.S.C. § 1536(a)(2). The action agency must then evaluate the effects of granting the ROW on listed species and critical habitat. 50 C.F.R. § 402.02(c).

If the ROW has the potential to affect listed species or critical habitat, the approval of the ROW is typically conditioned on a suite of measures, to be undertaken by the entities, that are designed to avoid, minimize, and mitigate for these effects. EWAC members that have an existing or future ROW within federal lands where unoccupied, uninhabitable areas are designated as critical habitat may be obligated to provide conservation measures as a condition of the ROW approval.

These conservation measures may impose restrictions that prevent timely access to electrical infrastructure, which is especially problematic when emergency repairs are needed.

Moreover, because electric transmission and distribution systems extend over great distances, during project design and ESA consultation the effects to critical habitat often are coarsely estimated based on critical habitat maps. In those instances, and where critical habitat is designated over uninhabitable areas, the magnitude of the effects to habitat that actually could be utilized by a species (and of the corresponding conservation measures required) are grossly overestimated during the ESA consultation process. Further, the opportunities to select routes that avoid impacts to habitat that listed species may actually use are obscured and lost.

Many EWAC members also have existing federal authorizations for their facilities (such as FERC licenses) that require consultation in accordance with ESA section 7(a)(2). These authorizations include provisions requiring that consultation be re-initiated should new critical habitat be designated that may be affected by the authorized action. The re-initiated consultation could result in the licensee being required to implement additional conservation measures to maintain a valid license. This is an unreasonable and costly outcome, particularly where the critical habitat triggering the consultation is neither habitable by a listed species nor likely to become habitable.

Finally, even where an EWAC member's facility is entirely private (and therefore does not trigger the obligations of ESA section 7(a)(2)), financing can be adversely impacted if critical habitat occurs within or adjacent to the facility's footprint. Financiers will

often impose more expensive terms to financing based on the existence of critical habitat because of the potential that a future federal authorization or permit could be needed, triggering ESA section 7 consultation, resulting in unanticipated costs. It becomes that much harder (indeed, nearly impossible) for all parties to evaluate future financial risk if the Service has the power to designate land occupied by a proposed project or existing facility as critical habitat even though the land lacks the physical or biological features needed to sustain the listed species. No preconstruction survey could identify or quantify this risk.

The Fifth Circuit's approval of the designation of "critical habitat" that is uninhabitable is such a profound departure from any reasonable and workable interpretation of the ESA that it warrants this Court's grant of certiorari and correction of that error.

II. Contrary To The Fifth Circuit's Ruling, The ESA Dictates That "Critical Habitat" Must Be Habitable.

The ESA defines occupied and unoccupied critical habitat separately. Occupied habitat must be occupied by the species at the time the species is listed as threatened or endangered. 16 U.S.C. § 1532(5)(A)(i). It is further differentiated by the presence of features that: (1) are "essential for the conservation of the species"; and (2) "may require special management considerations or protection." *Id.*

Unoccupied critical habitat is defined by the importance of the *area* to a listed species. It is limited to areas that are not occupied at the time of species listing but nevertheless are "essential for conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Looking only to the second part of the statute's definition of critical habitat, the Fifth Circuit determined – wrongly – that the sole criterion the ESA provides for designating unoccupied critical habitat is found in the word "essential" in section 1532(5)(A)(ii). Pet. App. 15a, 21a. The Fifth Circuit then ruled that the ESA does not define "essential," that the word is ambiguous, and accordingly that the Service's determination that an unoccupied area is "essential" and so should be designated as critical habitat (without regard to whether the area is habitable) is entitled to *Chevron* deference. Pet. App. 15a–16a, 21a, citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The Fifth Circuit should not have advanced past the first step in its *Chevron* analysis, as deference to the Service's interpretation of the ESA "is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (*quoting Chevron*, 467 U.S. at 843). The Fifth Circuit mistakenly ignored both the occurrence of the word "habitat" in the defined phrase itself and the ESA's operative provisions, which plainly state that critical habitat is, first and foremost, habitat for the listed species. *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2).

In any event, the Fifth Circuit's *Chevron* step 2 analysis is equally flawed, as the Fifth Circuit erred by endorsing the Service's unreasonable exclusion of habitability from the criteria for critical habitat. "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 573 U.S. ___, ___, 134 S.Ct. 2427, 2442 (2014) (*quoting*

City of Arlington, Tex. v. Fed. Commc'ns Comm'n, 569 U.S. 290, 133 S.Ct. 1863, 1868 (2013)).

A. The Fifth Circuit failed to consider the operative provisions of the ESA, which plainly state that critical habitat must be habitable.

The Fifth Circuit's majority stated its view of the central issue in this appeal categorically: "There is no habitability requirement in the text of the ESA." Pet. App. 23a. But in making that sweeping pronouncement, the Fifth Circuit was wrongly informed by having read the statute's critical habitat definition in isolation and having failed to account for how the term is used in the operative provisions of the ESA. *See* Pet. App. 15a–27a (majority opinion analyzes only section 1532(5)(A)(i)–(ii)).

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666 (internal quotation omitted). Failing to follow this basic tenet caused the Fifth Circuit to adopt a mistaken Service interpretation that is squarely inconsistent with the plain meaning of the criteria for critical habitat set out in other ESA provisions.

The Fifth Circuit began by ignoring the fact that the term "critical habitat" includes the word "habitat," carrying with it the implication that an area is capable of supporting a particular species, even if the species does not currently occupy the area. This meaning of the term, readily apparent on its face, is validated by the way the term "critical habitat" is used in the operative provisions of the ESA. "[R]easonable statutory interpretation must account for both 'the specific

context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Section 4 of the ESA authorizes the Service to designate a subset of the habitat of a listed species as "critical habitat":

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable –
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*;

16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This provision only authorizes the Service to designate "habitat of such species" as critical habitat. It does not authorize critical habitat designations for areas that are not habitable.

The definition of critical habitat in ESA section 3 must be read in the context of the criteria that ESA section 4 also provides to the Service for designating critical habitat—including the requirement that critical habitat be "habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i); *see Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (interpretation must account for "the broader context of the statute as a whole"). These ESA provisions should be interpreted in harmony; the definition in section 3 cannot nullify

the explicit requirement in section 4 that critical habitat be habitat for the listed species, yet that is the effect of the Fifth Circuit's ruling.

Congress also described critical habitat as a subset of a species' habitat in ESA section 7, one of the statute's central protections for listed species, directing all federal agencies to consider the potential damage to "habitat . . . which is determined . . . to be critical" that could stem from their actions and the actions they approve:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical*, ...

16 U.S.C. § 1536(a)(2) (emphasis added). The phrase "habitat of such species which is determined . . . to be critical" refers to critical habitat designated under ESA section 4. *See Bennett v. Spear*, 520 U.S. 154, 157–58 (1997). By using the formulation "habitat . . . which . . . is critical" to describe "critical habitat," section 7 could not be more explicit that its requirements apply to the "critical" subset of the habitat for a listed species.

The Fifth Circuit's holding that "[t]here is no habitability requirement in the text of the ESA," Pet. App. 23a, is flatly contradicted by the plain language of ESA

sections 4 and 7. Both are explicit that "critical habitat" must be habitat of the listed species.

B. The Fifth Circuit wrongly gave *Chevron* deference to a Service interpretation of unoccupied critical habitat that conflicts with the plain language of the ESA.

As discussed in the prior section, the Service's determination that unoccupied critical habitat need not be habitable by the listed species rests upon 16 U.S.C. § 1532(5)(A)(ii) read in isolation from the rest of the statute. The Service's interpretation of that provision conflicts with the plain language of the other ESA provisions that govern the actual designation of critical habitat and the protection of that habitat in federal agency decision-making, 16 U.S.C. §§ 1533(a)(3)(A)(i) and 1536(a)(2).

Deference to the Service's interpretation of the ESA "is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders*, 551 U.S. at 665 (*quoting Chevron*, 467 U.S. at 843). "In making the threshold determination under *Chevron*" as to whether congressional intent is clear or ambiguous in the language of a statute, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" *Id.* at 666 (*quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

The Fifth Circuit should have stopped after the first step in its *Chevron* analysis. Here, congressional intent is clear that critical habitat is a subset of the habitat of a listed species. 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2). The Fifth Circuit never considered those

provisions. If it had done so, it would not have erroneously claimed that "there is no habitability requirement in the text of the ESA." Pet. App. 23a.

"A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (*quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)) (*ellipsis in original*).

The ambiguity the Fifth Circuit found in the ESA's definition of unoccupied critical habitat is removed by the remainder of the ESA's statutory scheme. It is a bedrock requirement of the statute, when read as a whole, that an area must provide habitat for a species if it is to be designated as occupied or unoccupied critical habitat. *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2). The Fifth Circuit should not have given *Chevron* deference to the Service's determination otherwise, as Congress directly addressed that precise question in the ESA's operative provisions.

C. The Fifth Circuit wrongly gave *Chevron* deference to a Service interpretation that goes beyond reason.

The Fifth Circuit concluded that it was obligated to extend *Chevron* deference to the Service's determination that an area that is not and could not be occupied by the dusky gopher frog is, nevertheless, critical habitat. Pet. App. 15a, 21a–22a. It found that the phrase "essential for the conservation of the species," appearing in the definition of unoccupied critical habitat in 16 U.S.C. § 1532(5)(A)(ii), gave discretion to the

Service, noting that the ESA does not define "essential." Pet. App. 15a. It held that, by using this undefined term, Congress delegated authority to the Service to determine whether an unoccupied area is "essential" for a species and that when the Service promulgates such a determination through formal rulemaking it is entitled to *Chevron* deference. Pet. App. 15a.

As explained above, *Chevron* deference was unwarranted as to the central question here, since portions of the statute ignored by the Fifth Circuit plainly state congressional intent that critical habitat be habitable by a species. Contrary to the Fifth Circuit's holding, "an agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S.Ct. at 2442 (*internal quotation omitted*).

However, even without the guidance provided by other portions of the ESA, the Fifth Circuit was wrong to give deference to the Service's interpretation. "Even under *Chevron's* deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Id.*, 134 S.Ct. at 2442. *Chevron* "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Mich. v. Envtl. Prot. Agency*, 576 U.S. __, __, 135 S.Ct. 2699, 2707 (2015). But an agency's reading of a statute must still remain within the bounds of reasonable interpretation. *Id.*

Reading the ESA to allow an uninhabitable area to be designated as "critical habitat" strays far beyond the bounds of reasonable interpretation and cannot survive judicial scrutiny. *See id.* (EPA wrongly interpreted the word "appropriate" in the Clean Air Act

provision as allowing it to ignore costs of pollution controls).

There are limits to the meaning of "essential," and so to the Service's discretion. Here, the Service designated as "essential" an area that provides no conservation benefit to the dusky gopher frog and will not do so in the future. To deem an area "essential" to a species that has no connection to the species and no foreseeable ability to sustain the species goes beyond the bounds of reason. Even where *Chevron* deference does apply, it has limits, and those limits were exceeded here. *See id.*

III. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that requiring unoccupied habitat to be habitable "effectively conflates" the separate standard for unoccupied land with the standard for land occupied by a species, and that only occupied habitat must contain all of the relevant physical or biological features to support a species. Pet App. 23a. As a result, the Fifth Circuit imposed a significantly less stringent standard on the designation of unoccupied habitat, which here contained only one of three features necessary for survival of the dusky gopher frog, from the standard applicable to designation of occupied habitat. *Id.*

This holding put the Fifth Circuit in direct conflict with Ninth Circuit decisions recognizing that the criteria for unoccupied critical habitat are more stringent, not less stringent, from those applicable to occupied critical habitat. As was made clear in *Arizona Cattle Growers' Association v. Salazar*, the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas" as critical habitat. 606 F.3d at 1163.

At issue in *Arizona Cattle Growers* was whether the Service unlawfully designated areas containing no Mexican spotted owls as occupied critical habitat in order to "bypass[ ] the statutory requirements for designating unoccupied areas." *Id.* at 1162. Directly after reciting the ESA's dual definition of "critical habitat," the Ninth Circuit stated: "The statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Id.* at 1163.

The Ninth Circuit then went on to analyze at length the meaning of "occupied," the term that underpinned the factual question of "whether the [Service] treated unoccupied areas as occupied to avoid this more onerous process." *Id.* Such extended analysis would not have been necessary but for the practical regulatory import of the dual definitions of critical habitat and the Ninth Circuit's recognition that the standard for designation of unoccupied habitat is more onerous. *See id.* at 1163–67.

Later in 2010, the Ninth Circuit reiterated that the standard for unoccupied critical habitat "is a more demanding standard than that of occupied critical habitat." *Home Builders Ass'n of N. Cal.*, 616 F.3d at 990 (9th Cir. 2010). There, the plaintiffs claimed that the Service had conflated occupied and unoccupied habitat in certain designations of areas containing vernal pools as critical habitat for 15 species. *Id.* The Ninth Circuit reasoned that no requirement exists that each designated area be classified as occupied or unoccupied, and that:

> In any event, [the Service] ultimately concluded that "the areas designated by this final

> rule, including currently occupied and unoccupied areas, are essential for the conservation of the species." Essential for the conservation is the standard for unoccupied habitat and is a more demanding standard than that of occupied critical habitat. Thus, basing the designation on meeting the more demanding standard poses no problem.

Id. (internal citations omitted). The Ninth Circuit upheld the critical habitat designation because it met the higher standard for designation of unoccupied habitat regardless of whether some areas were in fact occupied. *Id.*

In contrast, the Fifth Circuit here interpreted "essential for the conservation of the species" as imposing a decidedly lower standard on the designation of unoccupied habitat. By granting such liberal deference to the USFWS interpretation, the Fifth Circuit effectively inverted the rigor associated with each type of critical habitat designation and (apparently unknowingly) rejected the Ninth Circuit's patently contrary interpretation of the plain language of the ESA. Further, the Fifth Circuit majority opinion failed to acknowledge or directly address the relevant portions of this contrary case law of the Ninth Circuit. This Court should grant certiorari to resolve this conflict between the circuits regarding one of the primary mechanisms for the Service's implementation of the ESA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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